

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

JAN 19 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-87
)	
RAYMOND W. CLANTON)	File No. BPH-911216MC
)	
LOREN F. SELZNICK)	File No. BPH-911216MD
)	
For Construction Permit)	
for a new FM Station on)	
Channel 279A in El Rio,)	
California)	

To: Administrative Law Judge
John M. Frysiak

OPPOSITION TO COUNTERMOTION FOR SUMMARY DECISION

Raymond W. Clanton, by his attorney, hereby opposes the Countermotion for Summary Decision, filed by Loren F. Selznick on January 6, 1994, in the above-captioned proceeding.

Selznick's Countermotion was filed in response to Clanton's own Motion for Summary Decision, filed December 23, 1993 (hereinafter "Motion"), on two qualifying issues: (1) whether Selznick was financially qualified when she filed her application in December 1991, and (2) whether she is financially qualified at present. To be considered for grant of her application, Selznick must prevail on both issues. Disqualified under either issue mandates denial of her application.

Summary decision is appropriate only where there is no genuine issue of material fact. While Clanton demonstrated that summary decision adverse to Selznick should be granted in his Motion, this opposition merely responds to Selznick's

Counter-motion. Clanton demonstrates herein that Selznick is not entitled to a favorable summary decision, because she fails to present sufficient undisputed facts to warrant such a grant, and because the record as a whole supports grant of adverse summary decision. Selznick's Counter-motion must be denied.

I. Selznick's initial financial certification.

According to her application, Selznick's sole source of funds to meet her estimated construction and initial operating costs of \$360,070 was a \$361,000 loan from Joseph P. Dailey.¹ It is undisputed that prior to filing her application she received nothing in writing from Mr. Dailey regarding his willingness to make a loan. Furthermore, she did not have in her possession a written financial statement of Mr. Dailey.

First, Selznick has not shown that her cost estimate was complete. She does not know whether it included freight and sales taxes on the equipment she was purchasing. (Selznick deposition, p. 118). Selznick's claim of available funds leaves less than \$1,000 for unanticipated costs. A sales tax of 5% on \$20,000 would add \$1,000 to her cost estimate. Hence, Selznick has not proven that her claimed funding was adequate to meet all her expected costs. In the absence of such a showing it cannot be determined that Selznick was financially qualified when she filed her application.

¹ Selznick's counter-motion fails to give the basis of her cost estimate, for no breakdown of individual costs is provided.

Clanton's Motion demonstrated that Selznick lacked a definitive arrangement to borrow money from Dailey. Dailey did not commit to a specific amount and the terms of the loan were never discussed. In response, Selznick asserts that Dailey was aware of the exact amount needed by Selznick, and agreed to provide it. She continues that "Mr. Dailey accepted the figure of \$360,070 as the figure that Ms. Selznick gave him in 1991." (Counter-motion at para. 4)

It is clear that Dailey never said he would provide a specific dollar amount of financing. He simply said he would "provide the financing." (Dailey deposition, p. 84) In arguing that such statement was sufficient under Commission policy, Selznick not only fails to cite to any authority, she does not distinguish Sunshine Broadcasting, Inc., 6 FCC Rcd 5981 (Rev. Bd. 1991), which Clanton cited in his Motion.

A full reading of Dailey's deposition testimony on the amount of the loan, as cited in Clanton's Motion, results in a conclusion far different from the one Selznick seeks to draw. Selznick acknowledges that Dailey consistently referred to the amount of his loan as \$350,000, but asserts, without any explanatory statement from Dailey or other justification, that it was merely a general term, despite the fact that the alleged loan was in excess of \$10,000 more than that amount. (Counter-motion at note 3). Dailey's deposition testimony, taken as a whole, shows that he recalled the sum of \$350,000 as the amount he was to provide. Only when he read the

statement which Selznick prepared for him did the larger figure enter his mind. His reaction even then was not recollection of the amount asserted by Selznick, but merely passive non-disagreement with her. At a minimum, Dailey's deposition testimony on the amount of the prospective loan is so unclear that it may not form the basis for grant of summary decision in Selznick's favor.

Selznick further alleges that "there was no need to discuss the 'terms' (of the loan) expressly because both of them understood that the loan from Mr. Dailey would be under 'reasonable commercial terms for a loan of this nature,' i.e., for a start-up company." (Counter-motion at para. 5) Selznick seeks to overcome the undisputed fact that she and Dailey failed to discuss any of the terms of the loan by asserting that the terms of the loan were mutually understood.

Selznick fails to explain how she and Dailey could have reached an understanding of the terms of the loan without any discussion thereof. She does not assert that they possess extra-sensory perception ("esp"), or other novel means of communicating. Also, Selznick does not explain how she arrived at her "understanding" of the reasonable commercial terms which she claims would apply to a start-up station in California. Nowhere does she indicate that she approached a financial institution to discuss a loan for her station.

Moreover, Dailey indicated in his deposition that he had additional terms in mind should he provide the financing for

Selznick's station. He would act as an advisor to Selznick with regard to his investment. If she formed a corporation, he would probably want to be on the Board of Directors. (Dailey deposition, p. 77)² Selznick does not refer to these conditions in her Countermotion, let alone aver that she understood their existence at the time she filed her application.

Another reason for denying Selznick's Countermotion is that she had insufficient information about Dailey's financial status.³ Selznick asserts that Dailey went through his financial statement "item by item", citing Dailey deposition pages 52-53.

Selznick misreads Dailey's testimony, however. He testified that once he recited his cash and a sum owed to him by his former law firm, which totalled over \$500,000, "[W]e stopped there." (Dailey deposition, page 53, line 11-12) Hence, the item by item review was quite limited, and was not a full recitation of every item on Dailey's financial statement, as Selznick would have the Commission believe.

Before she could determine that Dailey had adequate "net liquid assets" to make his loan, Selznick had to fully

² Thus, Dailey's commitment to finance Selznick's station was clearly not "unconditional."

³ Clanton maintains that the absence of a written financial statement in Selznick's possession is disqualifying. Selznick, on the other hand, asserts that her telephone conversation in which Dailey read certain items from his financial statement was adequate. The resolution of this point is a question of law, not fact.

evaluate his liabilities, as "net liquid assets" is the difference between total liquid assets and current liabilities. Yet, Selznick fails to state that any conversation about Dailey's liabilities occurred. To the contrary, it is clear that she had absolutely no familiarity with them. Dailey testified in his deposition that the first time Selznick had any information on his liabilities was in August 1993, the first time he sent her a copy of his financial statement. See, p. 33, l. 9-24; p. 34, l. 3-7; p. 53, l. 15-p. 54, l. 14; of his deposition, all attached to Clanton's Motion. These references outweigh Dailey's statement on page 85 of his deposition that his house mortgage was his only significant debt. Hence, even if an oral discussion of Dailey's financial statement, in lieu of a written document "on hand", could suffice under current Commission policy, the conversation which actually occurred was woefully lacking. It clearly did not provide Selznick with adequate information on Dailey's financial status. This is another ground for denying Selznick's Countermotion.

Selznick's Countermotion does not answer the question of whether Dailey had sufficient net liquid assets in 1991 to make a loan of \$361,000. Selznick's inability to prove this point is another basis to deny her Countermotion.

Other than the \$218,000 in cash shown on the 1991 financial statement, there is no indication that any of the assets listed are liquid. Thus, without considering Dailey's

liabilities, Selznick has not proven he could make the loan.

With regard to Dailey's liabilities, Selznick asserts that Dailey's mortgage payments are about \$6,000 per month, citing his deposition testimony at p. 95. However, that same page indicates that Dailey's interest rate is variable; nowhere does he give his payment in 1991, which likely would have been higher, as it is general knowledge that interest rates are lower now than they were two years ago.

Also, Selznick incorrectly considers only one months' mortgage payment as a current liability. The Commission considers the portion of long term payments due within a year as a current liability. See Instructions to former FCC Form 301, Section III, question 4, paragraph b., attached hereto for convenience. Hence, Dailey's mortgage payments would reduce his liquid assets by a full year's payments, at least \$72,000, in addition to the approximately \$45,000 reduction due to the bank loan. The \$6,000 reduction mentioned by Selznick is clearly insufficient. Selznick has failed to meet her burden of proving Dailey's 1991 liabilities, a necessary component of his "net liquid assets" at that time.

Simply put, Selznick fails to demonstrate that no material issues of fact remain regarding her initial financial certification. She has not provided a basis for summary decision in her favor.

II. Selznick's current financial qualifications.

Selznick's contention that she is financially qualified

at the present time is premised on acceptance of her pending amendment, filed January 6, 1994. As her application now stands, she requires at least \$360,070 to construct and operate her station for three months without revenue. Yet she claims only \$140,700 in available funds, an amount which is clearly insufficient. Selznick is not financially qualified at this date, and will continue to lack financial qualifications if her petition for leave to amend is denied.

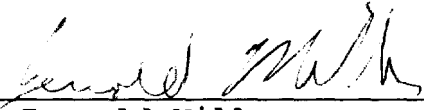
Moreover, even acceptance of Selznick's amendment will not result in her being financially qualified at present. In his January 18, 1994, Opposition to Selznick's financial amendment, Clanton gave numerous reasons for denying the amendment. Inter alia, Clanton demonstrated that Selznick's amendment, even if accepted, would not result in her being financially qualified. For example, Commission policy calls for a reduction of 1/3, or \$68,000, in the amount credited for the sale of Selznick's cooperative apartments. Port Huron Family Radio, Inc., 5 FCC Rcd 4562, n. 5 (1990). This reduction, by itself, reduces Selznick's level of available funds to well below her claimed expenses. Clanton's January 18, 1994, Opposition is incorporated herein by reference. The portions pertinent to Selznick's claim for present financial qualifications are repeated in Appendix A hereto, with footnotes renumbered for convenience.

In sum, Selznick has not justified grant of summary decision in her favor on either of the financial qualifica-

tions issues. Her Countermotion must be denied.

Respectfully submitted,

RAYMOND W. CLANTON

By 
Jerrold Miller
His Attorney

January 19, 1994

Miller & Miller, P.C.
P.O. Box 33003
Washington, DC 20033

APPENDIX A

According to her own liquidity analysis, Exhibit C to her amendment, Selznick has only \$100,700 available from her own resources. Most will come from the liquidation of her two cooperative apartments which are appraised at \$118,000 and \$86,000, making a total of \$204,000 before payment of mortgages.

However, it is Commission policy not to credit the full appraised value of real estate in determining liquid assets, but rather to discount it by 33 1/3%, in recognition of the fact that the net proceeds received by a seller of real estate are normally lower than fair market value. Port Huron, supra, at n.5. Thus, Selznick's proceeds from the sale of her apartments must be reduced by 1/3 of the \$204,000 claimed in her liquidity analysis (Appendix D to her amendment), or \$68,000. For this reason, Selznick may be credited with no more than \$136,000 (\$204,000 less \$68,000) from the sale of her cooperative apartments. This reduction alone reduces her net liquid assets to \$32,700, which, even when Dailey's claimed loan of \$40,000 is added, gives her only \$72,700, an amount clearly insufficient to meet her claimed costs of \$109,460.

Certain of the other assets claimed by Selznick to be liquid are unproven. She provides no information whatsoever on her claimed \$8,000 inheritance. Her inheritance may not be credited as a liquid asset, for she makes no showing of when she will receive it. It is the applicant's burden to demon-

strate that an asset is "liquid."

Selznick indicates approximately \$25,000 available to her from her retirement fund, after subtracting the 20% penalty for early withdrawal and 32.5% for (federal) taxes. She testified that her taxable income in 1992 was about \$80,000, and that it should be somewhat more for the current year. As a single person, her retirement fund withdrawal would also be subject to 7.59375% in New York State and 4.46% in New York City taxes. See the attached Tax Rate Schedule. Accordingly, her deduction for taxes is insufficient by about 12% and she must subtract about \$5,000 from the amount she states as available from her retirement accounts.

Selznick claims to have present assurance of a loan from Joseph P. Dailey for \$40,000. In an attempt to demonstrate her assurance of Dailey's loan, Selznick supplies his Declaration of August 27, 1993, and portions of his deposition. In his Declaration of the same date, Dailey states the amount of the loan, the repayment terms and interest rate. He does not identify the collateral which will be required.¹

It is clear that there are terms behind Dailey's loan commitment which are not specified in the material Selznick presents in her amendment. For example, Dailey stated in his deposition that he would definitely take on the role as an advisor to Selznick with regard to his investment. If she

¹ Clanton noted this deficiency in his opposition to Selznick's earlier amendment.

formed a corporation, he would probably want to be on the Board of Directors. p. 77.² There may be other conditions on the loan, for there is nothing from Dailey giving the complete terms. Moreover, Selznick does not indicate her acceptance of even the expressed conditions.

The failure to specify collateral is fatal to acceptance of Dailey's loan commitment. Except in rare cases, not relevant here, the Commission requires financing letters to specify the collateral and insists that the applicant demonstrate it is able to provide it. Scioto Broadcasters, 5 FCC Rcd 5158 (Rev. Bd. 1990), and Peter Joseph Devlin and Patricia Eve Devlin, FCC 90M-2690, released August 27, 1990 (ALJ Frysiak), citing with approval A. P. Walter, Jr., 6 FCC 2d 875 (Rev. Bd. 1991). Also, the current instructions to Form 301 recite that in certifying its financial qualifications, "the applicant is also attesting that it can and will meet all contractual requirements, if any as to collateral, guarantees..." Without knowing what such collateral or guarantees may be, Selznick is unable to certify that she can and will meet them. Accordingly, the Commission may still not credit Selznick with any funds from Mr. Dailey. The conclusion is beyond doubt; Selznick does not currently have financing to cover even her reduced cost estimate.

Dailey's purported loan is suspect for yet another

² This contradicts Dailey's statement on page 65 of his deposition that his commitment to finance Selznick's station was "unconditional. "

reason... The only clearly liquid asset shown is \$42,800 in cash, which is less than his outstanding bank loan of nearly \$69,000. Dailey's August 1993 financial statement does not adequately show that he has sufficient net liquid assets, as defined by the Commission, to make a \$40,000 loan. For these reasons, Selznick's amendment fails to demonstrate that Dailey has given her reasonable assurance of a loan.

**FUNDS, PROPERTY, ETC., TO BE FURNISHED BY
PARTIES CONNECTED WITH APPLICANT OR BY OTHERS**

4. Submit as Exhibit No. ____ a statement setting forth the full name and address of each person (whether or not connected with applicant, but including partners, shareholders, or subscribers to capital stock of the applicant) who has furnished or will furnish funds, property, service, credit, loans, donations, assurances, or other things of value, or will assist in any other manner in financing station. For each person (other than financial institutions or equipment manufacturers) who has furnished or will furnish one percent or more of the total of things of value, excluding loans from financial institutions and equipment credit, supply the additional information requested in a. to d. below. For financial institutions or equipment manufacturers, supply the additional information requested in e. below. ("Furnish" or "furnished" as herein used includes payments for capital stock or other securities, loans and other credits, gifts and any other contributions.)

- a. For each person who has agreed to furnish funds, purchase stock, extend credit, or guarantee loans, submit a copy of the agreement by which each person is so obligated, showing the amount, rate of interest, terms of repayment, and security, if any. If no security is required, so state.
- b. For each person (except financial institutions) who has agreed to furnish funds or purchase stock, but who has not already done so, submit a balance sheet or, in lieu thereof, a financial statement showing all liabilities and containing current and liquid assets sufficient in amount to meet current liabilities (including amounts payable during the next year on long term liabilities) and, in addition, to indicate financial ability to comply with the terms of the agreement. The balance sheets submitted should segregate receivables and payables to show the amounts due within one year and those due after one year. The term and liquid assets refers to items such as cash, or loan value of insurance, government bonds and publicly traded securities (provided, however, that such securities must be identified by the type of security, name of issuer and the name of the market or exchange on which traded, at their current market value), or other assets which may be readily used or converted to provide funds to meet the proposed commitments. Current assets such as accounts receivable which result from normal operation of a business, inventory, etc., are not considered as a readily available source of funds without a specific showing that such assets can be relied upon to provide funds to meet proposed commitments. However, if accounts receivable have been "aged" and certified collectible within 90 days by a professional accountant, three-fourths (3/4) of such accounts receivable will be treated as "liquid." If a balance sheet or a financial statement does not clearly indicate liquid and current assets sufficient in amount to meet current liabilities and in addition, sufficient liquid assets to meet the proposed commitments, it should be supplemented by a statement showing the manner in which non-liquid assets will provide such funds. When the applicant relies upon "non-liquid assets," a statement must be submitted showing the extent to which such assets have liens or prior obligations against them. All balance sheets, or financial statements submitted in accordance with this section must be dated. In any event, a mere statement of total assets and total liabilities, or a statement of net worth, is not acceptable under the terms of this section.
- c. Net income after Federal income tax, received for the past two years by each person who will furnish funds, property, service, credit, loans, donations, assurances, or other things of value. (A statement that income tax for the required periods was in excess of a certain specified amount will be sufficient.)
- d. If applicant or any person named in the exhibit has pledged, hypothecated or otherwise encumbered any stocks or other securities for the purpose of providing applicant with funds for construction of the station herein requested, submit a statement explaining each such transaction.
- e. For financial institutions or equipment manufacturers who have agreed to make a loan or extend credit, submit a copy of the document by which the institution or manufacturer has indicated its willingness to provide such loan or credit, showing the amount of loan or credit, terms of payment or repayment of loan, collateral or security required, and rate of interest to be charged. If there are any special requirements such as a moratorium on principal or interest, or a waiver of collateral, etc., it must be shown on the document of credit. In the event such document requires special endorsements or guarantees, a statement from the party or parties required to provide such endorsement or guarantee must be submitted with the document as supporting evidence of their willingness to so provide.

Tax Rate Schedule (Use only to figure your 1992 estimated taxes)

New York State Tax Rates

Married Filing Jointly and Qualifying Widow(er)			Single and Married Filing Separately			Head of a Household		
If line 5 is:			If line 5 is:			If line 5 is:		
over	but not over	The tax is:	over	but not over	The tax is:	over	but not over	The tax is:
\$ 0	\$12,000	4.5% of line 5	\$ 0	\$6,500	4.5% of line 5	\$ 0	\$9,000	4.5% of line 5
12,000	18,000	\$492 plus 5.5% of the excess over \$12,000	6,500	9,500	\$294 plus 5.5% of the excess over \$6,500	9,000	14,000	\$410 plus 5.5% of the excess over \$9,000
18,000	25,000	492 plus 5.5%	9,500	12,500	482 plus 5.5%	14,000	19,000	687 plus 5.5%
25,000		519 plus 7.5% of the excess over \$25,000	12,500		609 plus 7.5% of the excess over \$12,500	19,000		1,015 plus 7.5% of the excess over \$19,000

City of New York Tax Rates

Married Filing Jointly and Qualifying Widow(er)			Single and Married Filing Separately			Head of a Household		
If line 5 is:			If line 5 is:			If line 5 is:		
over	but not over	The tax is:	over	but not over	The tax is:	over	but not over	The tax is:
\$ 0	\$14,000	2.51% of line 5	\$ 0	\$8,000	2.51% of line 5	\$ 0	\$8,000	2.51% of line 5
14,000	15,500	\$351 plus 3.06% of the excess over \$14,000	8,000	9,000	\$201 plus 3.06% of the excess over \$8,000	8,000	16,500	\$221 plus 3.68% of the excess over \$8,000
15,500	27,000	351 plus 3.68%	9,000	15,000	232 plus 3.68%	9,000	18,500	303 plus 4.28%
27,000	45,000	374 plus 4.28%	15,000	25,000	451 plus 4.28%	15,000	27,500	574 plus 4.40%
45,000	108,000	374 plus 4.40%	25,000	80,000	879 plus 4.40%	25,000	88,000	2,668 plus 4.40%
108,000		374 plus 4.40%	80,000		2,419 plus 4.40%	80,000		2,668 plus 4.40%

Amended Estimated Tax Worksheet

(Use only if your estimated tax increases or decreases.)

	New York State	City of New York	City of Yonkers
1. Amended estimated tax			
2. Overpayment from 1991 credited to estimated tax			
3. Balance (subtract line 2 from line 1)			
4. Estimated tax payments made to date			
5. Unpaid balance (subtract line 4 from line 3)			
6. Installment due (divide line 5 by the number of remaining payments due)			

Record of Estimated Tax Payments

Record credits and payments in this table. Keep this record; you will not be receiving notices indicating the amount due each quarter.

	a	b	c	d
Payment	Date	Amount	1991 Overpayment Credit Applied	Total Amount Paid and Credited (add b and c)
Voucher				
Voucher				
Voucher				
Voucher				
Total				

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of January, 19 94
a copy of the foregoing document was placed in the United States mail,
first class postage prepaid, addressed to the following:

Paulette Laden, Esq.
Hearing Branch, Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, NW, Suite 7212
Washington, DC 20554

Robert L. Thompson, Esq.
Pepper & Corazzini
1776 K Street, NW, Suite 200
Washington, DC 20006

Robin Green